No. 17-368

IN THE

Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Petitioner,

v.

TESLA ENERGY OPERATIONS, INC., F/K/A SOLARCITY CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FEDERAL COURTS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 6

I. SUBSTANTIVE DEFENSES TO LIABILITY ARE NOT PROPERLY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE 6

II. THE STATE-ACTION DOCTRINE IS A SUBSTANTIVE DEFENSE TO FEDERAL ANTITRUST LIABILITY 14

CONCLUSION 22

APPENDIX A-1

TABLE OF AUTHORITIES

CASES

Abney v. *United States*,
431 U.S. 651 (1977) 11

Al Shimari v. *CACI Int'l, Inc.*,
679 F.3d 205 (4th Cir. 2012) (en banc) 11

Alden v. *Maine*,
527 U.S. 706 (1999) 17

Ashcroft v. *Iqbal*,
556 U.S. 662 (2009) 13

Burlington N. & Santa Fe Ry. Co. v. *Vaughn*,
509 F.3d 1085 (9th Cir. 2007) 13

Cal. Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*,
445 U.S. 97 (1980) 19, 20

Cohen v. *Beneficial Indus. Loan Corp.*,
337 U.S. 541 (1949) 2, 3, 7, 9, 10, 20

Courtright v. *City of Battle Creek*,
839 F.3d 513 (6th Cir. 2016) 5, 18

Digital Equipment Corp. v. *Desktop Direct, Inc.*,
511 U.S. 863 (1994) 2, 4, 7, 9, 11, 12, 20

Firestone Tire & Rubber Co. v. *Risjord*,
449 U.S. 368 (1981) 7

FTC v. *Phoebe Putney Health Sys., Inc.*,
568 U.S. 216 (2013) 4, 15, 19

FTC v. *Ticor Title Ins. Co.*,
504 U.S. 621 (1992) 15, 19

Gelboim v. *Bank of Am. Corp.*,
135 S. Ct. 897 (2015) 3, 10

Henry v. *Lake Charles Am. Press LLC*,
566 F.3d 164 (5th Cir. 2009) 10

Jinks v. *Richland County*,
538 U.S. 456 (2003) 17

Kerr v. *U.S. Dist. Ct. for the N. Dist. of Cal.*,
426 U.S. 394 (1976) 6

Kilburn v. *Socialist People's Libyan Arab Jamahiriya*,
376 F.3d 1123 (D.C. Cir. 2004) 13

Lake Country Estates, Inc. v. *Tahoe Regional Planning Agency*,
440 U.S. 391 (1979) 17

Lauro Lines s.r.l. v. *Chasser*,
490 U.S. 495 (1989) 9

Microsoft Corp. v. *Baker*,
137 S. Ct. 1702 (2017) 8

Midland Asphalt Corp. v. *United States*,
489 U.S. 794 (1989) 3, 12

Mitchell v. *Forsyth*,
472 U.S. 511 (1985) 7, 12, 13

Mohawk Indus. v. *Carpenter*,
558 U.S. 100 (2009) 3, 8, 10, 11

N. Ins. Co. of N.Y. v. *Chatham County*,
547 U.S. 189 (2006) 17

N.C. State Bd. of Dental Examiners v. *FTC*,
135 S. Ct. 1101 (2015) 3, 5, 10, 15, 18, 19, 20

Nixon v. *Fitzgerald*,
457 U.S. 731 (1982) 13

Osborn v. *Haley*,
549 U.S. 225 (2007) 13, 14

Owen v. *City of Independence*,
445 U.S. 622 (1980) 18

P.R. Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*,
506 U.S. 139 (1993) 13, 17

Parker v. *Brown*,
317 U.S. 341 (1943) ..... *passim*

Patrick v. *Burget*,
486 U.S. 94 (1988) 20

Richardson-Merrell, Inc. v. *Koller*,
472 U.S. 424 (1985) 7

S.C. State Bd. of Dentistry v. *FTC*,
455 F.3d 436 (4th Cir. 2006) 5, 18

Seaman v. *Duke Univ.*,
No. 15-462, 2016 WL 1043473
(M.D.N.C. Feb. 12, 2016) 11

SolarCity Corp. v. *Salt River Project Agric. Improvement & Power Dist.*,
859 F.3d 720 (9th Cir. 2017) 1, 2, 14

Swint v. *Chambers County Comm'n*,
514 U.S. 35 (1995) 8

United States v. *Rostenkowski*,
59 F.3d 1291 (D.C. Cir. 1995) 13

Van Cauwenberghe v. *Biard*,
486 U.S. 517 (1988) 11, 12, 20

Will v. *Hallock*,
546 U.S. 345 (2006) 2, 8, 10

Will v. *United States*,
389 U.S. 90 (1967) 6

FEDERAL STATUTES AND RULES

28 U.S.C.
§ 1291 ..... 2, 6, 7, 8, 11, 12, 20
§ 1292(b) 3, 10
§ 1292(e) 8
§ 1651 ..... 3, 10
§ 2072(c) 8

Local Government Antitrust Act of
1984,
Pub. L. No. 98-544, 98 Stat. 2750 16

Sherman Act, 15 U.S.C. §§ 1 *et seq.* 4, 5, 15, 16, 19

Fed. R. Civ. P. 23(f) 9

INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are law professors who teach and write in the field of federal courts, with particular attention to the allocation of federal jurisdiction as between the district courts and courts of appeals. *Amici* take no position on the merits of Respondent's claims against Petitioner. Instead, *amici* come together in this case out of a shared belief that the decision below correctly declined to extend the collateral order doctrine to encompass a district court's rejection of a state-action defense under federal antitrust law. *See SolarCity Corp.* v. *Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720 (9th Cir. 2017).

More to the point, and contrary to the arguments of the Petitioner and its *amici*, *amici* Federal Courts Scholars are of the view that the collateral order doctrine can—and does—meaningfully distinguish between immunities from suit and substantive defenses to liability. Although a district court's rejection of claims in the former category often will be appropriately subject to immediate appeal under the collateral order doctrine, its denial of the latter class of claims never should be.

SUMMARY OF ARGUMENT

For seven decades, this Court has recognized a "small class [of trial-court rulings] which finally determine claims of right separable from, and

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1. The Petitioner has lodged a blanket consent to the filing of *amicus* briefs, and Respondent has consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Such immediately appealable "collateral orders" must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will* v. *Hallock*, 546 U.S. 345, 349 (2006) (alterations in original; internal quotation marks omitted).

In this case, the putatively "collateral" order at issue is the district court's denial of Petitioner's motion to dismiss Respondent's antitrust suit based upon the "state-action" doctrine recognized by this Court in *Parker* v. *Brown*, 317 U.S. 341 (1943). The Ninth Circuit held that *Parker* claims are not immediately appealable collateral orders. *SolarCity*, 859 F.3d at 725–27. A proper understanding of the collateral order doctrine itself—and of *Parker* and its progeny—compels the conclusion that the Court of Appeals was correct, and that its decision dismissing Petitioner's appeal should be affirmed.

I. The collateral order doctrine is "best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quoting *Cohen*, 337 U.S. at 546). To ensure that the doctrine does not undermine that rule, this Court "ha[s] not mentioned applying the collateral order doctrine recently without emphasizing its modest scope." *Will*, 546 U.S. at 350. "And we have meant what we have

said; although the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership." *Id.* This skepticism toward judge-made expansions of the doctrine has understandably grown since Congress expressed its preference for rulemaking, rather than judicial rulings, as the appropriate mechanism to identify new species of interlocutory appellate jurisdiction. *See Mohawk Indus.* v. *Carpenter*, 558 U.S. 100, 113 (2009).

As such, the district court's ruling must satisfy an existing strand of the collateral order doctrine. And although *Cohen* identified three factors, the core of the inquiry is whether the denial of Petitioner's claim is effectively unreviewable on appeal after an adverse final judgment. If a trial-court order *is* effectively reviewable after final judgment, there is no categorical imperative justifying abnormal resort to interlocutory appellate intervention. And any case-specific imperative can be addressed through the case-specific alternatives of certification under 28 U.S.C. § 1292(b), *see, e.g.*, *Gelboim* v. *Bank of Am. Corp.*, 135 S. Ct. 897, 906 (2015), or, in extraordinary instances, writs of mandamus under 28 U.S.C. § 1651. *See Mohawk*, 558 U.S. at 110–11.

For those reasons, a defendant's assertion of an "immunity" will never satisfy the collateral order doctrine if the immunity is, in fact, better understood as a defense to all (or certain kinds of) liability, rather than a right to be free from the cost of the underlying litigation *itself—i.e.*, a right not to be tried. Of course, "[o]ne must be careful . . . not to play word games with the concept of a 'right not to be tried.'" *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 801 (1989). Otherwise, at a sufficiently high level of

abstraction, "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a right not to stand trial." *Digital Equipment*, 511 U.S. at 873. That said, it is possible to identify such rights not to stand trial, at least in this context, with more clarity and precision than Petitioner suggests: At a minimum, an appellant invoking the collateral order doctrine to vindicate a claimed right not to be tried should have the burden of identifying the constitutional provision, statute, or common-law rule that specifically confers upon them an immunity from being brought into court at all.

II. The Petitioner here cannot satisfy that burden. *Parker*'s state-action rule derives from the absence of any affirmative indication that Congress in the Sherman Act "intended to restrict the sovereign capacity of the States to regulate their economies." *FTC* v. *Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 224 (2013). However *Parker* is characterized, its core is a judicial construction of the substantive scope of the Sherman Act, to wit, of the limits on the *liability* it imposes. *See* 317 U.S. at 352 ("The state . . . , as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.").

Because the Sherman Act, as construed by this Court, does not create a right not to be tried, the Petitioner and its *amici* instead rely upon interests that are adequately protected by other immunity doctrines, especially sovereign and official immunity. Of course, there is no reason why those immunities would be unavailable if Petitioner were actually entitled to them—or why a wrongful denial of such immunities would not be immediately appealable. Instead, "the only time that a party must rely on

Parker to justify immediate appeal is when . . . it *cannot* assert a sovereign or qualified immunity defense." *S.C. State Bd. of Dentistry* v. *FTC*, 455 F.3d 436, 447 (4th Cir. 2006) (emphasis added). In such cases, this Court has already determined that the interests upon which the Petitioner and its *amici* rely are insufficient to justify immunity from suit. It follows *a fortiori* that the interests in such cases also do not justify an immediate, interlocutory appeal. *See, e.g.*, *Courtright* v. *City of Battle Creek*, 839 F.3d 513 (6th Cir. 2016).

The inappropriateness of extending the collateral order doctrine to encompass a district court's rejection of a *Parker* claim is reinforced by the "flexible and context-dependent" analysis courts must undertake in determining whether a "nonsovereign entity—public or private—controlled by active market participants" is exempted from the Sherman Act, *i.e.*, whether they were actively supervised by the state. *N.C. State Bd. of Dental Examiners* v. *FTC*, 135 S. Ct. 1101, 1113, 1116 (2015). Such an inquiry typically will depend not only upon the details of specific legal arrangements under state law, but also upon case-specific determinations concerning the extent of a state's *actual* involvement in overseeing the entity at issue. *See, e.g.*, *id.* at 1118 (Alito, J., dissenting) ("Determining whether a state agency is structured in a way that militates against regulatory capture is no easy task . . . .").

Because this Court is properly loath to expand the collateral order doctrine through common law, these defects are fatal to Petitioner's argument here—and should therefore compel the conclusion that the Court of Appeals correctly dismissed Petitioner's interlocutory appeal.

ARGUMENT

I. SUBSTANTIVE DEFENSES TO LIABILITY ARE NOT PROPERLY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE

A. This Collateral Order Doctrine is a Narrow—and Carefully Circumscribed—Exception to the Final Judgment Rule

The final judgment rule codified at 28 U.S.C. § 1291 has historically served as a powerful bulwark against piecemeal litigation and unnecessary pressure on appellate dockets. *See, e.g.*, *Kerr* v. *U.S. Dist. Ct. for the N. Dist. of Cal.*, 426 U.S. 394, 403 (1976) ("[P]articularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation."). To that end, "[i]t has been Congress' determination since the Judiciary Act of 1789 that as a general rule 'appellate review should be postponed . . . until after final judgment has been rendered by the trial court.'" *Id.* (quoting *Will* v. *United States*, 389 U.S. 90, 96 (1967)).

More than just a tool for increasing the efficiency of litigation, the final judgment rule serves as an important statutory barrier to what otherwise might be a deluge of interlocutory appeals—appeals that would unduly burden the courts of appeals, undermine the case-management authority of the district courts, and inevitably tilt civil litigation toward the party with greater financial resources. As Justice Marshall explained, the final judgment rule

> emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that

> occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "[avoiding] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." The rule also serves the important purpose of promoting efficient judicial administration.

Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368, 374 (1981) (alteration in original; citations omitted); *see also Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 430 (1985) ("In § 1291 Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by 'piecemeal appellate review of trial court decisions which do not terminate the litigation.'" (citation omitted)).

The collateral order doctrine is "best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Digital Equipment*, 511 U.S. at 867 (quoting *Cohen*, 337 U.S. at 546). To ensure that the doctrine does not undermine the purpose and effect of the final judgment rule, this Court "ha[s] not mentioned applying the collateral order doctrine recently without emphasizing its modest scope." *Will*,

546 U.S. at 350; *see also Digital Equipment*, 511 U.S. at 868 ("[T]he 'narrow' exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." (citation omitted)). "And we have meant what we have said; although the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership." *Will*, 546 U.S. at 350.

As this Court recognized in *Mohawk*, judicial skepticism of arguments for expanding the collateral order doctrine is further justified by multiple acts of Congress "designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable." 558 U.S. at 113 (quoting *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 48 (1995)); *see also* 28 U.S.C. § 1292(e) ("The Supreme Court may prescribe rules . . . to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for . . . ."); *id.* § 2072(c) ("Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.").

Thus, "Congress, which holds the constitutional reins in this area, has determined that such value judgments are better left to the collective experience of bench and bar and the opportunity for full airing that rulemaking provides." *Mohawk*, 558 U.S. at 118–19 (Thomas, J., concurring in part and concurring in the judgment). And as this Court observed just last year in *Microsoft Corp.* v. *Baker*, 137 S. Ct. 1702 (2017), resort to the rulemaking process for new expansions of interlocutory appellate jurisdiction

helped to result in the "careful calibration" of Fed. R. Civ. P. 23(f). *Id.* at 1709 & n.4.

B. A Collateral Order Must Be Effectively Unreviewable After a Final Judgment and of Sufficient Importance to Justify Interlocutory Appellate Intervention

For the rare category of orders properly deemed "collateral," and thus immediately appealable, the heart of the matter is a judgment about whether the court *ought* to permit an appeal before the case has come to its ultimate conclusion in the district court—whether the benefits of an immediate appeal outweigh its substantial costs in terms of both litigation and judicial resources. To that end, as Respondent correctly argues, collateral orders must be *both* effectively unreviewable after final judgment *and* of sufficient importance to justify interlocutory appellate intervention. *See, e.g., Digital Equipment*, 511 U.S. at 878–79 ("[T]he third *Cohen* question, whether a right is 'adequately vindicable' or 'effectively reviewable,' simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement."); *see also Lauro Lines s.r.l.* v. *Chasser*, 490 U.S. 495, 502 (1989) (Scalia, J., concurring) ("The importance of the right asserted has always been a significant part of our collateral order doctrine.").

As Justice Souter wrote for this Court in *Will*,

> In each case [in which the collateral order doctrine has been upheld], some particular value of a high order was marshaled in support of the interest in avoiding trial: honoring the separation of powers, preserving the efficiency of

> government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual. That is, it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is "effectively" unreviewable if review is to be left until later.

546 U.S. at 352–53.

Although a properly appealable collateral order must of course satisfy all three of *Cohen*'s requirements, its hallmark is thus the district court's refusal to vindicate a sufficiently important interest the abridgement of which is "effectively unreviewable" if appellate review is deferred until after a final judgment. *See Henry* v. *Lake Charles Am. Press LLC*, 566 F.3d 164, 177 (5th Cir. 2009) (describing unreviewability as "the fundamental characteristic of the collateral order doctrine" (citation omitted)).

If a trial-court order *is* effectively reviewable after final judgment, there is no categorical imperative justifying abnormal resort to interlocutory appellate intervention. And any case-specific imperative can be addressed through the case-specific alternatives of certification under 28 U.S.C. § 1292(b), *see, e.g.*, *Gelboim*, 135 S. Ct. at 906, or, in extraordinary instances, writs of mandamus under 28 U.S.C. § 1651. *See Mohawk*, 558 U.S. at 110–11.[2] Thus, "[a]s long as

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2. Although Petitioner unsuccessfully sought certification of the district court's ruling under § 1292(b), Pet. Br. 10, it did not seek a writ of mandamus from the Ninth Circuit to review the

the class of claims, taken as a whole, can be adequately vindicated by other means, the chance that the litigation at hand might be speeded, or a particular injustic[e] averted, does not provide a basis for jurisdiction under § 1291." *Id.* at 107 (quoting *Digital Equipment*, 511 U.S. at 868) (second alteration in original; internal quotation marks omitted).

C. Rejections of Defenses to Liability Should Therefore Never Qualify as Immediately Appealable Collateral Orders

In cases such as these, in which the appellant claims that the relevant district court decision is an immediately appealable collateral order because it rejected an immunity claim, the "critical question . . . is whether the essence of the claimed right is a right not to stand trial"—that is, whether it constitutes a true immunity from *suit*, and not an exemption from all (or particular forms of) liability. *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 524 (1988) (internal quotation marks omitted); *see also Al Shimari* v. *CACI Int'l, Inc.*, 679 F.3d 205, 214 (4th Cir. 2012) (en banc). Absent immediate appellate review of a trial court's denial of a defendant's litigation immunity, the right not to stand trial "would be irretrievably lost." *Van Cauwenberghe*, 486 U.S. at 524 (internal quotation marks omitted); *see also Abney* v. *United States*, 431 U.S. 651, 662 (1977) ("[E]ven if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that

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district court's rejection of its *Parker* claim. *See Mohawk*, 558 U.S. at 111 n.3; *see also Seaman* v. *Duke Univ.*, No. 15-462, 2016 WL 1043473 (M.D.N.C. Feb. 12, 2016) (certifying under § 1292(b) whether the defendant was covered by the *Parker* doctrine).

the Double Jeopardy Clause was designed to prohibit.").

By contrast, if the right at issue is one "not to be subject to a binding judgment of the court"—that is, a defense to liability—then the right can be vindicated just as readily on appeal from the final judgment, and a wrongful denial of that right is not, of itself, a collateral order. *Van Cauwenberghe*, 486 U.S. at 527; *see also Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). It's not that erroneous district court decisions in such cases are harmless or costless. But the harms and costs resulting from such rulings are outweighed by the harms and costs of allowing such immediate, interlocutory appeals.

In assessing whether the interest that the defendant seeks to vindicate is properly understood as a true litigation immunity and not as a defense to liability, "§ 1291 requires [the court] of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Digital Equipment*, 511 U.S. at 873. As this Court has repeatedly cautioned, "[o]ne must be careful . . . not to play word games with the concept of a 'right not to be tried.'" *Midland Asphalt*, 489 U.S. at 801. Otherwise, at a sufficiently high level of abstraction, "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a right not to stand trial." *Digital Equipment*, 511 U.S. at 873.

That said, it is possible to identify such rights not to stand trial, at least in this context, with more clarity and precision than Petitioner suggests: At a minimum, an appellant invoking the collateral order doctrine to vindicate a claimed right not to be tried should have the burden of identifying a constitutional

provision, a statute, or a common-law rule that specifically confers upon them an immunity from being brought into court in the first place. *See, e.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672 (2009) (explaining that district court decisions rejecting a qualified immunity defense are immediately appealable because "qualified immunity . . . is both a defense to liability and a limited 'entitlement not to stand trial or face the other burdens of litigation'" (citation omitted)).

To that end, this Court and the courts of appeals have construed the collateral order doctrine to allow immediate, interlocutory appeals from district court decisions denying claims of Eleventh Amendment immunity, *P.R. Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); tribal sovereign immunity, *Burlington N. & Santa Fe Ry. Co.* v. *Vaughn*, 509 F.3d 1085 (9th Cir. 2007); qualified immunity, *Mitchell*, 472 U.S. 511; absolute immunity, *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); immunity under the Westfall Act, *Osborn* v. *Haley*, 549 U.S. 225 (2007); immunity under the Speech or Debate Clause, *United States* v. *Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995); and foreign sovereign immunity, *Kilburn* v. *Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123 (D.C. Cir. 2004). In all of those contexts, the appellants could—and did—point to affirmative sources of a substantive right not to be tried, whether grounded in the Constitution, a federal statute, or common law.

For example, in the most recent decision in which this Court expanded the class of immediately appealable collateral orders, it was because the underlying statute—the Westfall Act—was "designed to immunize covered federal employees not simply

from liability, but from suit." *Osborn*, 549 U.S. at 238. Unless a defendant can identify a similarly affirmative source of an immunity "not simply from liability, but from suit," it is impossible to see how such a substantive defense would be effectively unreviewable on post-judgment appeal, regardless of how "important" the underlying substantive federal right at issue might be.

II. THE STATE-ACTION DOCTRINE IS A SUBSTANTIVE DEFENSE TO FEDERAL ANTITRUST LIABILITY

In its decision below, the Ninth Circuit concluded that the exception to federal antitrust claims for "state action" first recognized by this Court in *Parker* is properly characterized as a defense to liability rather than an immunity from suit—and that a district court's rejection of a *Parker* defense is therefore not an immediately appealable collateral order. *SolarCity*, 859 F.3d at 725–27.

Petitioner and its *amici* urge reversal principally on the ground that the Court of Appeals' analysis failed to recognize that, like sovereign and official immunity, the *Parker* doctrine "protects states and their citizens against unwarranted disruption of governmental functions, ensuring that public servants exercise their policymaking discretion without fear of being subjected to protracted litigation." Pet. Br. 4.

In light of the analysis above, *amici* Federal Courts Scholars are of the view that the Court of Appeals was correct, and that denials of *Parker* claims, by themselves, should never qualify as immediately appealable collateral orders. Instead, the interests protected by sovereign and official immunity doctrines

can and should be vindicated, where necessary and appropriate, by invocations of *those* grounds for an immediate, interlocutory appeal.

A. The Sherman Act Does Not Create, and *Parker* Did Not Recognize, a Freestanding Immunity From Suit

As this Court has repeatedly made clear, *Parker*'s state-action rule derives from the absence of any affirmative indication that Congress in the Sherman Act "intended to restrict the sovereign capacity of the States to regulate their economies." *Phoebe Putney*, 568 U.S. at 224; *see also N.C. State Bd. of Dental Examiners* v. *FTC*, 135 S. Ct. at 1109 ("If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, . . . federal antitrust law would impose an impermissible burden on the States' power to regulate."); *Parker*, 317 U.S. at 351 ("The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.").

In other words, whether characterized in judicial opinions as an "immunity," a "defense," or otherwise, the heart of the *Parker* doctrine is a judicial construction of the substantive scope of the Sherman Act, to wit, of the limits on the *liability* it imposes. *See Parker*, 317 U.S. at 352 ("The state . . . , as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit."); *see also FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992) (describing *Parker* as "the doctrine that federal antitrust laws are subject to supersession by state regulatory programs"). There is no suggestion in the Sherman Act itself, let alone in *Parker* or any of this

Court's subsequent decisions applying it, that Congress intended to create an immunity from suit—as opposed to a substantive exemption from liability—for defendants thereby exempted from the Sherman Act's scope.

B. Other Immunities Protect the Two Interests on Which Petitioner Relies

Tellingly, neither the Petitioner nor its *amici* offer any evidence to the contrary, or identify any language in the Sherman Act or subsequent judicial constructions thereof suggesting that the Act confers a freestanding immunity from suit.[3] Instead, their arguments rise and fall on the analogy between *Parker* claims and immunities more specifically designed to protect the unique interests of the sovereign and its officials. *See, e.g.*, Pet. Br. 13–14 ("These interests are irreversibly compromised by requiring the defendant to litigate to final judgment before having the opportunity to appeal an erroneous denial of immunity."). The central problem with this argument is that it simultaneously overstates the scope of these interests and undervalues the ability of defendants to otherwise vindicate them in cases in which they are properly implicated.

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3. This conclusion is only bolstered by the Local Government Antitrust Act of 1984, which confers immunity from *damages*, but not from *litigation*, on local governments (or officials or employees thereof acting in an official capacity) for claims arising under sections 4, 4A, and 4C of the Clayton Act. *See* Local Government Antitrust Act of 1984, Pub. L. No. 98-544, §§ 2–3, 98 Stat. 2750, 2750–51 (codified at 15 U.S.C. §§ 35–36). Indeed, the district court in this case granted Petitioner's motion to dismiss Respondent's antitrust damages claims. *See* Pet. App. 64a–65a, 68a–69a.

Taking sovereign immunity first, even as this Court has recognized a broad scope to state sovereign immunity, *see, e.g.*, *Alden* v. *Maine*, 527 U.S. 706 (1999), it has emphasized the limits of such immunity—including that it extends only to "States and arms of the State." *N. Ins. Co. of N.Y.* v. *Chatham County*, 547 U.S. 189, 193 (2006); *see also Jinks* v. *Richland County*, 538 U.S. 456, 466 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit."). This is true even when, as here, the defendant might be said to exercise a "slice of state power." *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979) (citation and internal quotation marks omitted).

Thus, in *Chatham County*, this Court expressly rejected the argument that a public entity that did not qualify as an "arm of the state" for Eleventh Amendment purposes could nevertheless invoke a species of "residual" Eleventh Amendment immunity. 547 U.S. at 194 & n.2. Instead, in cases such as *Chatham County*, the defendant has no sufficiently compelling sovereign interest to justify either the protections of the Eleventh Amendment or the concomitant protection of the collateral order doctrine. And, of course, where a sovereign immunity defense *is* properly available, nothing precludes a sovereign defendant from invoking *it*, along with *Parker*, and appealing a denial of the former as a collateral order under *Puerto Rico Aqueduct & Sewer Authority*.

The same holds for official immunity. If a suit seeks damages against a government officer in his or her personal capacity, ordinary official immunity doctrines are available. But where those doctrines are not available (as, for example, in suits against

municipalities), this Court has determined that suits against such defendants "threaten neither officers' initiative or states' dignity." *S.C. State Bd. of Dentistry*, 455 F.3d at 446; *see Owen* v. *City of Independence*, 445 U.S. 622, 638 (1980) (holding that municipalities enjoy no official or sovereign immunity from damages suits).

As the Fourth Circuit has helpfully summarized this analysis, "the only time that a party must rely on *Parker* to justify immediate appeal is when . . . it *cannot* assert a sovereign or qualified immunity defense." *S.C. State Bd. of Dentistry*, 455 F.3d at 447 (emphasis added). In such cases, this Court has already determined that the interests upon which the Petitioner and its *amici* rely are insufficient to justify immunity from suit. It follows *a fortiori* that the interests in such cases also do not justify an immediate, interlocutory appeal. *See, e.g., Courtright*, 839 F.3d at 523.

C. The Structure of a State-Action Defense is Especially Ill-Suited for the Collateral Order Doctrine

As the above discussion makes clear, the fact that the defense recognized in *Parker* is not a categorical immunity from litigation should, of itself, dispose of this case, because it follows that a district court's rejection of a *Parker* claim at the motion-to-dismiss stage will not be "effectively unreviewable" after final judgment; defendants can avail themselves of the defense (and thereby avoid liability) on post-judgment appeal even if it was incorrectly rejected by the district court. But the specific nature of the state-action defense in cases, like this one, brought against a "nonsovereign entity . . . controlled by active market

participants," *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1113, only reinforces that conclusion.

In deciding whether such defendants, public or private, count as state actors for purposes of the Sherman Act, this Court "employ[s] a two-part test, requiring first that 'the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy . . . be actively supervised by the State.'" *Phoebe Putney*, 568 U.S. at 225 (quoting *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)); *see also Ticor Title*, 504 U.S. at 633 ("Actual state involvement, not deference to private pricefixing arrangements under the general auspices of state law, is the precondition for immunity from federal law."). As Justice Kennedy put it three years ago, "Immunity for state agencies . . . requires more than a mere facade of state involvement, for it is necessary in light of *Parker*'s rationale to ensure [that] the States accept political accountability for anticompetitive conduct they permit and control." *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1111.

As such, for nonsovereign defendants like the Petitioner here, a trial court's application of the two *Midcal* prongs typically will require detailed, case-specific analysis of the nature of the particular state action at issue, along with analysis of the relationship between the nonsovereign defendant and the putative state regulators. This is especially true with respect to *Midcal*'s second prong:

> The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private

> parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Patrick v. *Burget*, 486 U.S. 94, 101 (1988). As a result, "the inquiry regarding active supervision is flexible and context-dependent." *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1116.

Because the active-supervision inquiry is "flexible and context-dependent," it typically will depend not only upon the details of a specific legal arrangement under state law, but also upon case-specific determinations with respect to a state's theoretical *and* actual involvement in supervising the quasi-private regulatory entity. *See, e.g.*, *id.* at 1118 (Alito, J., dissenting) ("Determining whether a state agency is structured in a way that militates against regulatory capture is no easy task . . . .").

Thus, although *amici* Federal Courts Scholars are of the view that *Parker* claims never will satisfy this Court's stringent criteria for immediately appealable collateral orders, that conclusion is all the more inescapable in cases, like this one, in which *Parker*'s applicability turns on the "flexible and context-dependent" analysis of "active supervision" under *Midcal*. Such cases are hardly an appropriate candidate for the "blunt, categorical instrument of [a] § 1291 collateral order appeal." *Digital Equipment*, 511 U.S. at 883.

* * *

The Respondent has argued that the Petitioner cannot satisfy any of the three *Cohen* factors. *Amici* take no position on the first two factors because we believe that this case can—and should—be resolved solely on Petitioner's inability to satisfy the third, *i.e.*, whether the district court's denial of Petitioner's *Parker* defense is "effectively unreviewable" on appeal from an adverse final judgment. Because *Parker* recognizes a substantive exemption from antitrust liability, and not an immunity from litigation, an erroneous application of that doctrine—whatever its importance—generally will be effectively reviewable on post-judgment appeal.

And because this Court is properly loath to expand the collateral order doctrine through common law, such a defect should be fatal to Petitioner's argument here—and should therefore compel the conclusion that the Court of Appeals correctly dismissed Petitioner's interlocutory appeal.

CONCLUSION

For the foregoing reasons, *amici* respectfully suggest that the decision below be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

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